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CONSTITUTIONAL LAW- EMINENT DOMAIN - POWER OF STATE TO CONDEMN LAND FOR LOW-COST HOUSING AND TRANSFER TO THE UNITED STATES

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CONSTITUTIONAL LAW — EMINENT DOMAIN — POWER OF STATE TO CONDEMN LAND FOR LOW-COST HOUSING AND TRANSFER TO THE UNITED STATES — Public low-cost housing legislation on a national scale in this country began with title II, section 202 of the National Industrial Recovery Act of 1933, which authorized the administrator to embark upon a program for "construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects."¹ But soon thereafter, in *United States v. Certain Lands in the City of Louisville*,² a majority of the United States

¹ 48 Stat. L. 201 (1933), 40 U. S. C. (1934), § 402(d). Previously the 1932 "Emergency Relief and Construction Act" authorized the Reconstruction Finance Corporation to make loans to publicly regulated corporations engaged in low-cost housing activity, 47 Stat. L. 711 (1932), § 201(a) (2), 15 U. S. C. (1934), § 605b (2). See Fisher, "Housing Legislation and Housing Policy in the United States," 31 MICH. L. REV. 320 (1933). The low-cost housing problem, as it stood before the N. I. R. A., is exhaustively discussed in a symposium in 1 LAW & CONTEMP. PROB. 135 (1934).

² (C. C. A. 6th, 1935) 78 F. (2d) 684, affirming (D. C. Ky. 1935) 9 F. Supp. 137. Certiorari was granted to the Supreme Court from the federal district court and also from the circuit court of appeals, but each time the petition was dismissed on motion of the solicitor general. Memorandum opinions are reported in 294 U. S. 735, 55 S. Ct. 548 (1935), and in 297 U. S. 726, 56 S. Ct. 594 (1936). The case has been extensively noted and discussed. See particularly an article in which the lower court decision is critically analyzed, Corwin, "Constitutional Aspects of Federal Housing," 84 UNIV. PA. L. REV. 131 (1935).

Circuit Court of Appeals for the Sixth Circuit decided that the N.I.R.A. was unconstitutional so far as it attempted to authorize the condemnation of land by the United States for slum clearance, because the national power of eminent domain is limited to such uses as are necessary to carry out the powers expressly delegated to Congress.

Shortly after this decision the United States worked out a new approach to the low-cost housing problem. The Housing Act of 1937³ was modeled on a plan to decentralize the housing administration. This was accomplished by means of subsidies to local housing authorities in the forms of loans, annual contributions and capital grants. Today, according to a recent survey,⁴ at least thirty-eight states have passed enabling statutes authorizing municipal, county and state housing agencies to undertake low-rent housing and slum-clearance projects and to condemn land for such purposes. The constitutionality of such state legislation has been uniformly upheld as against the objection that a taking for low-cost housing is not for a public use.⁵

Even though there is no doubt as to the constitutionality of the state condemnation statutes, there is still some question whether the admin-

³ 50 Stat. L. 888 (1937), 42 U. S. C. (Supp. 1939), § 1401, as amended by 52 Stat. L. 820 (1938), 42 U. S. C. (Supp. 1939), §§ 1410 (e), (f), 1420, 1430. There is an early discussion of the 1937 act in 6 GEO. WASH. L. REV. 182 (1938).

⁴ HOUSING LEGAL DIGEST (Sept. 1939 Supp.). According to the division headed "United States" in this publication, "256 local public housing agencies have been organized in 37 states, the District of Columbia, Hawaii and Puerto Rico. 126 of these local agencies have entered into 176 loan and annual contributions contracts with the U. S. H. A. [United States Housing Authority] for financial assistance in the construction and administration of 267 low-rent housing and slum-clearance projects. Loan contracts with the U. S. H. A. total \$472,745,000 as of August 15, 1939. The U. S. H. A. is authorized to enter into loan contracts totaling \$800,000,000. Contracts with the U. S. H. A. for federal annual contributions for low-rent housing projects total \$20,813,200 as of August 15, 1939. The U. S. H. A. is authorized to enter into federal annual contributions contracts totaling \$28,000,000."

⁵ The question whether state condemnation for low-rent housing and slum clearance is for a public use has been much discussed. The first case upholding state condemnation for such a purpose was *New York City Housing Authority v. Muller*, 270 N. Y. 333, 1 N. E. (2d) 153 (1936). Decisions have since trickled in from other states and in every case the reasoning of the Muller case has been approved and adopted. *McNulty v. Owens*, 188 S. C. 377, 199 S. E. 425 (1938), is typical. Courts and writers have cited *In re Opinion of the Justices*, 211 Mass. 624, 98 N. E. 611 (1912), for the contrary proposition, that low-rent housing is not a public purpose either for the expenditure of state funds or for the exercise of the state's power of eminent domain. But no less an authority than the Supreme Judicial Court of the Commonwealth of Massachusetts has declared that its 1912 opinion stands for no such rule. In *Allydonn Realty Corp. v. Holyoke Housing Authority*, (Mass. 1939) 23 N. E. (2d) 665, the Massachusetts statute enabling local housing authorities to conform with the Federal Housing Act of 1937 was declared constitutional, and the 1912 opinion was distinguished.

istrative set-up of the present housing program in the United States is sound.⁶ It may appear that low-cost housing will fare better under national ownership and control, so it is important to know whether the constitution will permit such a change. If the *Louisville* case is sound,⁷ the United States may not condemn land directly for low-cost housing. Since the right of eminent domain is necessary to the success of a comprehensive low-cost housing and slum-clearance program, the alternative is to have a state condemn and then transfer the land so acquired to the United States. The question whether such a procedure is possible attracted a good measure of attention at the time the *Louisville* case was pending in the circuit court of appeals.⁸ But the excitement died down when Congress decentralized the housing program in 1937. In a very recent Nebraska decision, *Lennox v. Housing Authority of City of Omaha*,⁹ the problem was first presented for judicial examination and a majority of the court found that the Nebraska legislature could not provide for the conveyance to the United States of property condemned for slum-clearance and low-rent housing. For this determination the court cites only the *Louisville* case, somehow reasoning from it that "The federal government cannot therefore

⁶ See 6 GEO. WASH. L. REV. 182 at 190, 191 (1938). Of interest in this connection are the following excerpts from an editorial in 75 SURVEY 343 (Nov. 1939): "The resignation last month of Alfred Rheinstein as chairman of the New York City Housing Authority was regarded the country over as a calamity to the national housing program. . . . Mr. Rheinstein's resignation came in the wake of an apology made by Mayor La Guardia to Nathan Straus, U. S. housing administrator, for criticism of certain policies of the U. S. Housing Authority made in a magazine article of which Mr. Rheinstein was co-author. However, the underlying cause of Mr. Rheinstein's resignation is seen in a long series of breaks on major matters of policy between federal and local housing authorities. Viewed as a protest, the resignation takes on national significance and brings into the open a fundamental question as to the relation of the U. S. Housing Authority and the 260 local housing authorities. Should the federal-local housing program be centralized or decentralized?" The magazine article referred to in the above editorial is Rheinstein and Pringle, "Why Slum Clearance May Fail," 179 HARPER'S MAGAZINE 520 (Oct. 1939).

⁷ Although the issue decided in the *Louisville* case is collateral to the present discussion, the writer believes that the opinion of the majority of the circuit court of appeals for the sixth circuit would not find favor with the Supreme Court. The district court decision was subjected to a blistering attack in Professor Corwin's article, "Constitutional Aspects of Federal Housing," 84 UNIV. PA. L. REV. 131 (1935). Moreover, a recent holding of the circuit court of appeals for the tenth circuit is contra to the *Louisville* decision. *Oklahoma City v. Sanders*, (C. C. A. 10th, 1938) 94 F. (2d) 323.

⁸ See 4 GEO. WASH. L. REV. 130 (1935); 44 YALE L. J. 1458 (1935); 48 HARV. L. REV. 1021 (1935).

⁹ 137 Neb. 582, 290 N. W. 451, 291 N. W. 100 (1940). Note the interesting point raised on rehearing. The concurring judge in the original case thought that the decision of the majority on the precise point here under discussion was mere dictum. This leads to the inference that the point was not exhaustively argued before the court.

properly take or own property for the purposes of providing slum clearance or low income housing.”

It by no means follows, merely because the United States may not *condemn* land for low-cost housing, that it may not *own* property for such a purpose. The power of the United States to receive property and to hold it should be at least as broad as the power to spend. The limits of the national spending power are marked out by the general welfare clause of the constitution. In view of the extremely liberal interpretation given the general welfare clause in the recent *Butler* case¹⁰ and in the Social Security Tax cases,¹¹ the Supreme Court may well find that low-cost housing is a public purpose within the meaning of the general welfare clause.¹² And while there may be a little doubt as to whether the problem of low-cost housing is national in scope, as distinguished from a matter of merely local concern, here again the courts are disposed to give the Congressional definition of national welfare the benefit of every possible doubt.¹³ The crucial question is not whether the United States may accept property that has been condemned by a state for low-cost housing, but whether a state may constitutionally condemn for low-cost housing land that it is authorized to transfer to the United States.

A state may, under the constitution, exercise the right of eminent domain within its territorial limits if (1) the taking is for a public use, and (2) such use is primarily for the benefit of its own people.¹⁴

It has already been noted, with reference to state enabling statutes passed to secure benefits under the 1937 federal housing act, that a taking by a state for low-cost housing is for a public use.¹⁵ If the purpose for which land has been taken by a state can be better accomplished by transferring the ownership to the United States housing authority, it cannot be said that the mere transfer of ownership will make the original taking any less for a public use.¹⁶ Especially is this so in the cir-

¹⁰ *United States v. Butler*, 297 U. S. 1, 56 S. Ct. 312 (1936).

¹¹ *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 S. Ct. 883 (1937); *Helvering v. Davis*, 301 U. S. 619, 57 S. Ct. 904 (1937).

¹² See *McNulty v. Owens*, 188 S. C. 377, 199 S. E. 425 (1938).

¹³ *Helvering v. Davis*, 301 U. S. 619, 57 S. Ct. 904 (1937); *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 S. Ct. 883 (1937). And see ROTTSCHAEFFER, CONSTITUTIONAL LAW, § 115 at p. 175 (1939).

¹⁴ These are the limitations that are relevant to the present discussion. They are not the only constitutional limitations on the right of eminent domain. For example, just compensation must be paid. In general on this phase of the subject, see 1 NICHOLS, EMINENT DOMAIN, 2d ed., §§ 23-36 (1917).

¹⁵ See note 5, *supra*.

¹⁶ This line of reasoning was followed in *State ex rel. Thomas Furnace Co. v. Milwaukee*, 156 Wis. 549, 146 N. W. 775 (1914), citing *Lancey v. King County*, 15 Wash. 9, 45 P. 645 (1896).

cumstances of the Nebraska case, where the same people that would have benefited from a local housing project stood to benefit from a national project.

A state may not condemn land within its jurisdiction *primarily* for the use of another state.¹⁷ Nor may a state condemn for the use of the United States if the taking does not proceed on a theory of state interest.¹⁸ But where the condemnation is originally for a state use and then the land is turned over to the United States in order to carry out more effectively the purpose for which the land was taken, there is no constitutional objection.¹⁹ At this point there would seem to be sufficient authority to justify state condemnation of land for use by the United States in a national low-cost housing and slum-clearance program. But until recently in all the cases where a transfer of land condemned by a state was upheld, the United States itself could have condemned the land. Thus it was possible to infer that a state might condemn land for the United States only where the United States could itself have taken the land by eminent domain. No such inference is possible in the light of three recent decisions upholding the right of a state to

¹⁷ *Kohl v. United States*, 91 U. S. 367 (1875); *Columbus Waterworks Co. v. Long*, 121 Ala. 245, 25 So. 702 (1898); *Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 21 Wyo. 204, 131 P. 43 (1913). The writer of a note in 44 *YALE L. J.* 1458 (1935) classifies as *contra*, *In re Townsend*, 39 N. Y. 171 (1868), a case in which the state of New York authorized the flooding of New York land in order to create a reservoir for a New Jersey canal. However, as pointed out in 1 *NICHOLS, EMINENT DOMAIN*, 2d ed., § 29 at pp. 97-98 (1917), the cases are reconcilable. The mere fact that a canal is to be located in New Jersey does not prevent New York residents from deriving a substantial benefit from it. That citizens of another state may also benefit from the exercise of the right of eminent domain is no objection to the condemnation. In the same manner, *Rogers v. Toccoa Electric Power Co.*, 163 Ga. 919, 137 S. E. 272 (1927); *Carnegie Natural Gas Co. v. Swiger*, 72 W. Va. 557, 79 S. E. 3 (1913); and *Langdon v. City of Walla Walla*, 112 Wash. 446, 193 P. 1 (1920), may be reconciled.

¹⁸ *People ex rel. Trombly v. Humphrey*, 23 Mich. 471 (1871). In this case it was held that the state of Michigan had no power to condemn land for a federal lighthouse. Judge Cooley made clear in his opinion that the state statute held unconstitutional did not proceed on a theory of state interest. See also *Darlington v. United States*, 82 Pa. 382 (1876), in which case the same result was reached with respect to state condemnation for a federal office building. The Massachusetts court, on the other hand, in *Burt v. Merchants' Ins. Co.*, 106 Mass. 356 (1871), thought that the state had sufficient interest in a federal post office to condemn land for one.

¹⁹ *Lancey v. King County*, 15 Wash. 9, 45 P. 645 (1896); *State ex rel. Thomas Furnace Co. v. Milwaukee*, 156 Wis. 549, 146 N. W. 775 (1914); *Burt v. Merchants' Ins. Co.*, 106 Mass. 356 (1871); *Reddall v. Bryan*, 14 Md. 444 (1859); *Grangeville Highway District v. Ailshie*, 49 Idaho 603, 290 P. 717 (1930); *Via v. State Commission on Conservation & Development*, (D. C. Va. 1935) 9 F. Supp. 556; *State ex rel. v. Oliver*, 162 Tenn. 100, 35 S. W. (2d) 396 (1931); *Yarborough v. North Carolina Park Comm.*, 196 N. C. 284, 145 S. E. 563 (1928).

condemn land for a national park,²⁰ for it is doubtful whether the United States has the power to condemn land for a national park.²¹ The power of the United States to condemn land has no logical bearing, either on the question whether the original taking by a state is for a public use, or upon the related question whether a taking of property by the state is primarily for the benefit of its own people. Consequently no constitutional impediment can be admitted to state condemnation for use by the United States in a national low-cost housing program.

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²⁰ See the last three cases in note 19, *supra*.

²¹ Note discussing the *Via* case in 44 *YALE L. J.* 1458 at 1460 (1935). If the national power of eminent domain is as limited in scope as the reasoning in the *Louisville* case seems to indicate, the United States probably cannot condemn land for a national park. But see note 7, *supra*.